88-1140

Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT W. LUDWIG, JR.,

Petitioner,

v.

EVERGREEN OVERLOOK, INC., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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Question Presented For Review

Did the Maryland appeals court's extreme sanction of summary dismissal, because of petitioner's omission of pleadings from a record extract, on an appeal raising no issue of the pleadings, deny petitioner federal due process with respect to his state-created right of appeal in violation of the Due Process and Equal Protection Clauses of the U.S. Constitution, where the full record of the case, including the pleadings, was before the court, and where no rule of court mandated the inclusion of pleadings in the record extract in every appeal.

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Opinions Below

The order of the Court of Appeals of Maryland denying petitioner's petition for a writ of certiorari to the Court of Special Appeals of Maryland appears in the appendix to this petition. (App. p. 4a). Also appearing in the appendix are the per curiam opinion of the Court of Special Appeals of Maryland (App. pp. 5a-6a), the mandate of that court entering a denial of petitioner's motion for reconsideration (App. p. 7a), the judgment of the Circuit Court of Prince George's County, Maryland (App. pp. 8a-9a), the order of that court denying petitioner's motion for reconsideration (App. p. 10a), and a subsequent judgment of that court. (App. pp. 11a-12a).

None of the foregoing decisions has been reported.[1]

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[1] The following persons and entities were parties before the Maryland Court of Special Appeals: Robert W. Ludwig, Jr. (appellant); and Evergreen Overlook, Inc., Residential Brokers, Ltd., Rocco Luppino, Judith H. Mullen, with John Cassidy, Kevin I. Gladd as substitute trustees (appellees). Evergreen Overlook, Inc. is a Maryland corporation wholly owned by Ms. Mullen. Residential Brokers, Ltd. is a Virginia corporation wholly owned by an officer of Evergreen Overlook, Inc.

Jurisdiction

On October 11, 1988, the Court of Appeals of Maryland denied petitioner's petition for a writ of certiorari to the Court of Special Appeals of Maryland. (App. p. 4a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3)(1986).

Constitutional Provision and Rules Involved [2]

Section 1 of the Fourteenth Amendment to the United States Constitution.

Rules 1028 b., i. and 1035 a., b. of the Maryland Rules of Procedure.

Statement of the Case

On May 12, 1985, petitioner signed a contract to purchase a new home in Prince George's County, Maryland from a developer, Evergreen Overlook, Inc. (hereinafter Evergreen), through its broker, Residential Brokers, Ltd. The contract was performed by Evergreen, although not signed by it, and settlement was scheduled for April 30, 1986 upon completion of the house. Just prior to settlement, the broker sent a notice of termination charging petitioner with breaches of contract, which the developer rescinded as unauthorized, as well as multiple revisions of a list of "extras", each one increasing the price of the house.

The broker and developer then refused to discuss or support the extras charged and threatened termination of the contract if petitioner failed to pay the increased price of the house at settlement, which they also refused to extend. Petitioner brought an action for declaratory relief, specific performance and fraud on the day of scheduled settlement.

Respondents made repetitive motions to dismiss petitioner's action, all of which were denied, and obtained continuances, some

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[2] The pertinent text of these provisions is set forth verbatim in the appendix. (App. pp. 1a-3a).

ex parte, which delayed trial until April 2, 1987. On that day, Evergreen announced that it no longer had title to the house, as its president, Rocco Luppino, had nine months before resigned from the corporation, paid off a construction loan on the property secured by a deed of trust, taken assignment of the note, and acquired title at his own foreclosure sale, paying about 60% of the fair market value of the house. The existence of the construction note and deed of trust was not disclosed during discovery, although the discovery requests made by petitioner should have resulted in production of these documents.

Granted leave, petitioner amended his complaint to add as parties Mr. Luppino and the owner of Evergreen, Judith Mullen, who was also its principal officer and attorney, with counts for fraud, tortious interference with contract, and punitive damages.

In a subsequent deposition (read at trial), Mr. Luppino admitted that the foreclosure was carried out as "the only way I could get a clear title from...this litigation that Mr. Ludwig had against us."

One week before trial, rescheduled to June 30, 1987, Evergreen filed a voluntary bankruptcy. Petitioner then went to the United States Bankruptcy Court for the District of Maryland to secure a lifting of the automatic stay. The day before trial, the stay was ordered lifted by Judge Friend of the federal court upon finding that the bankruptcy petition was filed "to avoid said trial [in state court] and for no other apparent purpose...."

At trial, the jury found petitioner's contract enforceable and binding, and Judge Bowen, a visiting circuit judge from Calvert County, Maryland, ordered specific performance by Mr. Luppino within sixty days. Judge Bowen had been assigned to the case after recusals by judges sitting in Prince George's County.

Judge Bowen also granted directed verdicts ("motions for judgment") dismissing petitioner's remaining claims, awarded interest to Mr. Luppino on the purchase money from the date of scheduled settlement (which was at that time $22,389), and allowed petitioner a $6,150 offset for rent collected, but denied

petitioner's requests for further relief. On August 26, 1987, Judge Bowen entered judgment, omitting the offset (App. pp. 8a-9a), and by separate order denied petitioner's motion for reconsideration. (App. p. 10a). [3]

On August 28, 1987, petitioner noted an appeal seeking review of seven questions: whether there was sufficient evidence in the trial record to preclude directed verdicts denying a jury trial on the claims of (1) fraud, (2) tortious interference, and (3) punitive damages. Petitioner also assigned as error the trial court's application of specific performance law which resulted in (4) an erroneous award of purchase money interest to respondents, and (5) denial of recoverable damages and (6) contract entitlements to petitioner; and (7) the failure to sanction respondents with costs and attorneys' fees for discovery abuse, repetitive motions, a concealed foreclosure, and a bankruptcy filing to avoid trial. (A copy of the table of contents to petitioner's brief, outlining these seven issues, appears in the appendix. (App. pp. 13a-14a)).

In accordance with Maryland Rules 1025 and 1026, the full record of the case was transmitted to the Maryland Court of Special Appeals.

On March 8, 1988, petitioner timely filed a detailed brief and a separate 464-page joint "record extract", required by Md. Rule 1028.

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[3] During the pendency of the appeal, petitioner's motion in the trial court to revise the judgment to include the offset was denied for lack of jurisdiction without prejudice to its refiling following the appeal. Petitioner's renewed motion, filed promptly upon the denial of certiorari by the Maryland Court of Appeals, was recently denied on December 30, 1988 by Judge Melbourne. Judge Melbourne further declared petitioner's specific performance award forfeited despite petitioner's arguments that performance had been inextricably tied to issues on appeal and stayed by the filing of a supersedeas bond, and entered a money judgment against petitioner in favor of Mr. Luppino in the amount of accrued interest, $39,786.48 (allowing the $6,150 offset for rent collected). (App. pp. 11a-12a). Mr. Luppino filed no affirmative motion or action for this relief, showed no damages, and holds title to the house whose appreciated value exceeds the interest award. This judgment in no way moots the issues raised here.

"*Rule 1028. Printed Record Extract in Civil Cases*", provides in pertinent part:

...

b. *Contents.*

1. *What to Be Included.* The printed extract shall contain such parts of the record as may *reasonably be necessary* for the determination of the questions presented by the appeal, and shall include:

(a) The judgment appealed from, together with the opinion or charge of the lower court, if any.

(b) So much of the evidence, pleadings or other parts of the record as is *material* to any question the determination of which depends upon the sufficiency of the evidence, pleadings or other matter contained in the record to sustain any action, ruling, order or judgment of the lower court.

...

Md. Rule 1028 b. (emphasis supplied).

The extract contained the papers mandated for every appeal, the judgment and charge below, in accordance with Md. Rule 1028 b.1(a), *supra*. It also contained the testimony of all witnesses, exhibits, colloquy, motions, orders and other parts of the record which were "material" or "reasonably necessary" to the seven issues raised, in accordance with Md. Rule 1028 b.1(b), *supra*. (A copy of the table of contents to the extract is appended. (App. pp. 15a-17a)). No issue of the sufficiency of the pleadings was raised by the parties either in their briefs, or at oral argument on May 11, 1988. The pleadings were not requested to be included by respondents, and were not included in the joint extract.

On May 20, 1988, the Court of Special Appeals of Maryland, following the argument and without reaching the merits, *sua sponte*, citing Md. Rules 1028 b.1, i.2 and 1035 a.2, b.5, without any order issuing from the court to include such pleadings in the "record extract," dismissed petitioner's appeal, on the ground that the pleadings were not included in the extract which the court deemed necessary to review the trial court's three directed verdicts on the claims for fraud, tortious interference, and punitive damages. (App. pp. 5a-6a).

The court did not refer to the four other issues remaining on the appeal. *Id.*

Petitioner's request for reconsideration and leave to supply copies of the pleadings, already in the record transmitted to the court, was denied. (App. p. 7a). Petitioner's petition below for a review of that decision by certiorari was denied by the Maryland Court of Appeals as not "desirable and in the public interest." (App. p. 4a).

The federal question sought to be reviewed here, denial of federal due process, was raised in petitioner's motion for reconsideration, which was denied without opinion by the Maryland Court of Special Appeals, and, together with a claim of denial of equal protection, in petitioner's petition for a writ of certiorari in the Maryland Court of Appeals and in the reply in support thereof, which was denied without opinion by Maryland's highest court. Pertinent portions of petitioner's motion, petition, and reply appear verbatim in the appendix. (App. pp. 18a-24a).

Reasons For Granting Writ

The Court of Special Appeals of Maryland arbitrarily and unjustly, in a plain abuse of discretion, and in violation of federal due process and equal protection denied petitioner his state-created right of appeal.

Despite the increasing volume of cases brought to the Court, many of which present important public issues, the Court has never dismissed as unimportant any denial of due process in the

hearing of a dispute, however modest, which a citizen has brought to his local courts to resolve. In past years where injustice or unfairness was apparent, which amounted to a denial of federal due process, the Court, pursuant to Rule 23.1 and 28 U.S.C. § 2106 (1986), by summary disposition has granted relief without full briefing and oral argument.

This petition presents such a case. The petitioner, a young lawyer, in the trial court, received partial relief in the form of specific performance consequent upon a favorable jury verdict, but his other claims were taken from the jury by the trial court on motions for directed verdict (motions for judgment).

Whatever the merits of petitioner's contentions as to his right of jury trial on those issues or on the other rulings of the trial court he complained of, petitioner had a state-created right to appeal those adverse rulings. Pursuing this state-created right, petitioner timely filed his notice of appeal which brought the full record of the case to the appeals court. Along with Maryland counsel, he prepared his brief and "record extract", including what is mandatory, and exercising judgment, as the Maryland rule provides, as to what is necessary for the appeals court to review his assignments of error, keeping in mind the admonition of the courts in Maryland that the extract should not be unduly voluminous and burdensome to the court and that only what is necessary should be included.[4]

Because he did not include his complaint in the "record extract", the court denied him review, although the complaint was contained in the record before the court. The court said: the "record extract is devoid of the pleadings necessary for us to review the trial court's actions," referring only to the three directed ver-

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[4] *See Gmurek v. Kajder*, 203 Md. 437, 101 A.2d 204, 206 (1953). *See also Bornstein v. State Tax Commission*, 227 Md. 331, 176 A.2d 859, 861 (1962)(stating "in many instances there is room for a perfectly justifiable difference of opinion as to what is necessary for the determination of a case, and we are not unmindful of the benefits of short records and of the elimination of nonessentials [,which] efforts...should be encouraged.")

dicts, "[h]ence, the extract provides us with nothing to review." (App. p. 6a). [5]

No Maryland reported decision has ever required that pleadings be included in the extract for an appeal that does not raise pleadings issues.[6]

No Maryland decision reports a summary dismissal where other issues remained on appeal.[7]

Having spent the time preparing his 464-page record extract, it would have been an easy matter to include additional pages covering the complaint and answers. *See* the mandate of the court spelling out the costs of petitioner's efforts to provide a complete extract. (App. p. 7a). However, considering the range of judgment embodied in the rule, and the admonitions of the court to include only what is necessary, petitoner and his counsel made the judgment that the pleadings were not necessary to the issues petitioner was bringing to the appeals court to review.

Whether the final pleadings in a case should be included in an "appendix" or "record extract" as a matter of course, which many

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[5] The court cited as case authority only *Eldwick Homes Association, Inc. v. Pitt*, 36 Md. App. 211, 373 A.2d 957 (1977), which makes no reference to the pleadings but involved a dismissal because the extract failed to include any of the evidence on which the appellant sought review. The court's opinion also gives undue emphasis to references in petitioner's appeals brief to "a complaint, an amended complaint, a supplement to the amended complaint, as well as the appellees' answers to each," (App. p. 6a)., found only in the "Statement of Facts" summarizing the involved history of the case, not in the "Argument."

[6] Decisions reviewing sufficiency-of-evidence issues on directed verdicts, as here, which are measured against the legal elements of the claim under state law, instruct counsel only that all of the material evidence must be included, *see Gmurek, supra* note 4, 101 A.2d at 206; *Silverman v. Ruddle*, 234 Md. 353, 199 A.2d 196 (1964); *Sunshine Laundry Corp. v. White*, 197 Md. 582, 80 A.2d 1 (1951); even where *no* extract was printed. *See Platt v. Wilson*, 191 Md. 371, 62 A.2d 191 (1948).

[7] The Maryland cases hold without exception that the appeal should not be dismissed if other questions are properly presented. *See Velasco v. Protestant Episcopal Church*, 200 Md. 634, 92 A.2d 373, 375 (1952); *Petite v. Homes, Inc.*, 184 Md. 377, 41 A.2d 71, 73 (1945). This rule is also followed in the federal courts. *See, e.g., Houston v. Southwestern Bell Telephone Co.*, 259 U.S. 318, 325 (1922).

experienced appellate practitioners do, it is nonetheless unconscionable and, it is submitted, unconstitutional to deny a citizen his state-created right of review of a case on the merits simply because, in the exercise of judgment, in compliance with a rule calling for judgment, he did not include in his "record extract" a pleading which was before the court in the transmitted record.

While the extreme sanction of dismissal is certainly justified for bad faith and flagrant disregard of court orders, *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), it was a gross abuse of discretion and denial of federal due process to impose the extreme sanction of dismissal under present circumstances, thus denying petitioner his state-created right of appeal.

The action taken by the intermediate appeals court of Maryland is inconsistent with the standards of federal due process and equal protection established by the Court. The Court should grant petitioner's petition and summarily reverse the decision of the Maryland Court of Special Appeals dismissing the appeal, with instructions to hear the appeal upon petitioner's compliance with any orders of the appellate court regarding the contents of the record extract.

THE DECISION OF THE MARYLAND COURT OF SPECIAL APPEALS CONFLICTS WITH THE DECISIONS OF THE COURT REQUIRING THAT MINIMUM STANDARDS OF FEDERAL DUE PROCESS AND EQUAL PROTECTION BE SATISFIED WITH RESPECT TO A STATE-CREATED RIGHT OF APPEAL IN A CIVIL CASE

The Court has consistently held that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review. *Evitts v. Lucey*, 469 U.S. 387 (1985); *Lindsey v. Normet*, 405 U.S. 56 (1972). If, however, a State has created appellate courts and afforded a litigant a right of appeal, "it cannot be granted to some litigants and capriciously or arbitrarily denied to others without

violating the Equal Protection Clause," *Lindsey*, 405 U.S. at 76, or the Due Process Clause. *Evitts,* 469 U.S. at 400-401, 403-405.

Recently the Court held that the Due Process Clause was violated when a a state appeals judge declined to recuse himself under the circumstances of that case which denied the litigant due process with respect to its state-created right of appeal. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986).

The highest court of Maryland has itself recognized that the right of appeal "'is a valuable right secured to parties, where they are vigilant, and not to be forfeited, unless where they are guilty of such laches as the law will not sanction.'" *Sullivan v. Insurance Commissioner,* 291 Md. 277, 434 A. 2d 1024, 1028 (1981)(citation omitted). Indeed, it has held that a summary dismissal of an appeal on less than such circumstances affects the "fundamental fairness of the proceeding" and "is a denial of due process." *Id.* at 1030.

The Federal Rules of Procedure offer guidelines of federal due process. While the Court has upheld dismissals of cases because of violations of procedural rules, the extreme sanction of dismissal has been upheld only in the case of flagrant, egregious or bad faith violations. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976).

As the Court held in *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363 (1966):

> We cannot construe Rule 23 or any other one of the Federal Rules as compelling courts to summarily dismiss, without any answer or argument at all, cases like this where grave charges of fraud are shown by the record to be based on reasonable beliefs growing out of careful investigation. The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. These rules were designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in

> court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits. Rule 23(b), like the other civil rules, was written to further, not defeat the ends of justice.

383 U.S. at 373. *See also Barber Asphalt Paving Co. v. Standard Asphalt & Rubber Co.*, 275 U.S. 372, 386-387 (1928); *Berman v. United States*, 378 U.S. 530, 537-538 (1964)(Black, J., dissenting); *Fallen v. United States*, 378 U.S. 139, 142 (1964).

The Maryland Court of Special Appeals could not and did not hold that the omission of pleadings from the extract was an egregious violation of the rule. Under the Maryland Rules, assuming a violation, the penalty imposed must be "appropriate", and dismissal is not allowed for mere inadvertence. Md. Rule 1028 i. provides in pertinent part:

> ...
>
> 2. *Violation of Section b.* For violation of section b. of this Rule this Court may require that additional portions of the record be printed or otherwise furnished, or it may dismiss the appeal, or make any other *appropriate* order with respect to the case.
>
> 3. *Inadvertent Errors.* Inadvertent omissions or misstatements in the printed extract or in any appendix may be corrected by direction of this Court on application or of its own motion.

Md. Rule 1028 i. (emphasis supplied).

The Maryland courts heretofore in reported decisions have adhered to these rules and constitutionally applied them, dismissing an appeal only for "egregious" violations of the rule. [8]

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[8] *See Wyndham v. Haines*, 305 Md. 269, 503 A.2d 719, 724 n.7 (1986). An egregious case under the reported Maryland decisions, consists of "numerous and serious" violations, or of omissions which are "'deliberate and intended to violate or evade the rule.'" *Kemp-Pontiac-Cadillac, Inc. v. S & M Construction Co.*, 33

In holding that pleadings were necessary to be included in the case at bar, the Maryland intermediate appeals court read into the rule an unwritten requirement that pleadings be included in the record extract in every appeal. The Maryland court provided no notice of such a requirement, and the requirement conflicts with that court's rule which specifies that which is mandatory in every appeal, and that which, in the judgment of the parties, is necessary for the court to decide the appeal. While recognizing that it is not this Court's role to pass on the correctness of a state court's *interpretation* of its own rules, this is a case in which the *application* of state rules unjustly deprives a state-created right of appeal in violation of federal due process.

Federal due process means, at the very least, that a citizen, who possesses a state-created right of appeal, should not be denied review on the merits of his appeal, unless by wilful violation or disregard of a court rule, he forfeits that right. In this case, with the full record before the court, the appeals court imposed the extreme sanction of dismissal *sua sponte,* after oral argument, without issuing, and providing an opportunity to comply with, an order or direction of the court that the pleadings should be included in the record extract.

This is not a case in which the litigant disregarded the rules. Indeed, he meticulously compiled a 464-page record extract of portions of the record he believed "reasonably necessary" or "material" to the questions on appeal in compliance with a court rule calling for judgment. The highest court of Maryland has recognized that there may be a "difference of opinion as to what is necessary for the determination of a case...." *Bornstein, supra* note 4, 176 A.2d at 861.

Whatever the merits of his appeal (and petitioner does not ask the Court to address the merits), petitioner has the constitu-

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Md. App. 516, 365 A.2d 1021, 1026 (1976) (citation omitted). *See also Martin Marietta Aggregates v. Citizens*, 40 Md.App. 26, 395 A.2d 179, 186 (1978) (holding it is "not appropriate" to dismiss "in the absence of prejudice to the appellees or a deliberate violation of the rules.")

tional right of due process to have the merits of his appeal heard, which procedural rules are designed to ensure.

It is respectfully submitted that the extreme sanction of dismissal for an omission in a record extract was, under the circumstances of this case, a denial of federal due process.

Conclusion

For the reasons set forth above, petitioner urges that this petition for a writ of certiorari be granted.

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Dated: January 9, 1989

Of Counsel:
CONDON & FORSYTH

CERTIFICATE OF SERVICE

I, Thomas J. Whalen, being over the age of 18 years and a member of the firm of Condon & Forsyth, hereby certify that I have this ninth day of January, 1989, served three copies of the foregoing petition for a writ of certiorari to the Court of Special Appeals of Maryland upon respondents Evergreen Overlook, Inc., et al., the only parties required to be served, by mailing such copies to their attorneys of record in sealed envelopes, first class postage prepaid, deposited at the United States Post Office, located at North Capitol and Massachusetts Avenue, N.E., Washington, D.C., and addressed as follows:

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APPENDIX

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Constitutional Provisions and Rules Involved

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rules 1028 and 1035 of the Maryland Rules of Procedure provide in pertinent part:

> Rule 1028. *Printed Record Extract in Civil Cases.*
>
> a. *Appellant to Print.*
>
> In civil cases, unless a statement is filed pursuant to Rule 1029 b or unless otherwise ordered by this Court, the appellant shall cause to be printed, either as a separate volume or as an appendix to his brief, extracts of the record which shall include the parts thereof provided for by section b of this Rule arranged in the order in which the same appear in the record. . . .
>
> b. *Contents.*
>
> 1. What to be Included.
>
> The printed extract shall contain such parts of the record as may reasonably be necessary for

the determination of the questions presented by the appeal, and shall include:

(a) The judgment appealed from, together with the opinion or charge of the lower court, if any.

(b) So much of the evidence, pleadings or other parts of the record as is material to any question the determination of which depends upon the sufficiency of the evidence, pleadings or other matter contained in the record to sustain any action, ruling, order or judgment of the lower court.

(c) Such other parts of the record as may be designated by the parties pursuant to section c. of this Rule.

...

i. *Penalties - Correction.*

1. Violation of Section a.

For violation of section a. of this Rule this Court may dismiss the appeal, or make any other appropriate order with respect to the case, including an order that an improperly printed appendix or printed extract be reprinted at the expense of the counsel for the party whose appendix or printed extract was improperly printed.

2. Violation of Section b.

For violation of section b. of this Rule this Court may require that additional portions of the record be printed or otherwise furnished,

or it may dismiss the appeal, or make any other appropriate order with respect to the case.

3. Inadvertent Errors.

Inadvertent omissions or misstatements in the printed extract or in any appendix may be corrected by direction of this Court on application or of its own motion.

Rule 1035. *Dismissal of Appeal.*

a. *By the Court.*

1. From Pro Forma Orders.

...

2. Any Other Cause.

This Court may, on its own motion, dismiss an appeal for any cause set forth in section b of this Rule.

b. *On Motion.*

On motion filed by any party, an appeal may be dismissed for any of the following reasons:

...

5. The contents of the printed record extract do not comply with section b. of Rule 1028 (Printed Record Extract in Civil Cases).

...

ROBERT W. LUDWIG, JR.

v.

EVERGREEN OVERLOOK, INC., et al.

IN THE COURT OF APPEALS OF MARYLAND

Petition Docket No. 240
September Term, 1988

(No. 1515, September Term, 1987 Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answers filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: October 11, 1988

UNREPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1515

September Term, 1987

ROBERT W. LUDWIG, JR.
v.
EVERGREEN OVERLOOK, INC., ET AL.

Gilbert, C.J.
Bloom,
Smith, Marvin H. (Retired,
specially assigned),

JJ.

PER CURIAM

Filed: May 20, 1988

Pursuant to Md. Rule 1035 a. 2 and b.5, we dismiss the appeal of *Ludwig v. Evergreen Overlook, Inc. et al.* We exercise the prerogative conferred upon us by Md. Rule 1028 i. 2, because the record extract required by Rule 1028 fails to include *any* of the pleadings in the action begun in the Circuit Court for Prince George's County.

Maryland Rule 1028 b. 1 provides:

" The printed extract shall contain such parts of the record as may reasonably be necessary for the determination of the questions presented by the appeal, and shall include:

> (a) The judgment appealed from, together with the opinion or charge of the lower court, if any.
>
> (b) So much of the evidence, pleadings or other parts of the record as is material to any question the determination of which depends upon the sufficiency of the evidence, pleadings or other matter contained in the record to sustain any action, ruling, order or judgment of the lower court.
>
> (c) Such other parts of the record as may be designated by the parties pursuant to section c. of this Rule."

Ludwig contends that the trial court erred in dismissing his claims for damages for fraud and tortious interference with a contract. Further, he claims punitive damages.

The record extract is devoid of the pleadings necessary for us to review the trial court's actions. In his brief, Ludwig refers to a complaint, an amended complaint, a supplement to the amended complaint, a second supplement to the amended complaint, as well as the appellees' answers to each. None of those writings are included in the record extract. Hence, the extract provides us with nothing to review. We have previously stated in *Eldwick Homes Association, Inc. v. Pitt*, 36 Md. App. 211, 212 (1977), "[W]e are not required to ferret out from the record those materials which counsel should have printed in the abstract." We reiterate what we said in *Eldwick*, and accordingly we dismiss the appeal.

APPEAL DISMISSED.
COSTS TO BE PAID BY APPELLANT

MANDATE
Court Of Special Appeals

No. 1515, September Term, 1987

Robert W. Ludwig, Jr.
v.
Evergreen Overlook, Inc. et al.

JUDGMENT: May 20, 1988: Per Curiam filed. Appeal dismissed. Costs to be paid by appellant.

June 15, 1988: Motion for Reconsideration filed by counsel for the appellant.
June 17, 1988: Motion for Reconsideration denied.

June 21, 1988: Mandate issued.

STATEMENT OF COSTS:

In Circuit Court: for Prince George's County CAE86-06873

Record	40.00
Stenographer Costs	1342.25
* Total*	1382.25*

In Court of Special Appeals:

Filing Record on Appeal	50.00
Printing Brief for Appellant	187.20
Reply Brief	312.00
Portion of Record Extract-Appellant	2241.60
Total	2790.80*
Printing Brief for Appellee	153.60
Portion of Record Extract--Appellee	19.20
Printing Brief for Appellee Mullen and Evergreen	134.40
Total	307.20

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

ROBERT W. LUDWIG, JR.	:	
Plaintiff,	:	
vs.	:	Case No. CAE 86-06873
EVERGREEN OVERLOOK, INC. et al.	:	
Defendants.	:	

ORDER

UPON CONSIDERATION, of the testimony and evidence at the trial of this case, and the jury verdict on special issues, it is by the Circuit Court for Prince George's County, this 26th day of August, 1987,

ORDERED, that the Motions for Judgment by the defendants Mullen and Residential Brokers, be granted, and it is further,

ORDERED, that Judgment be, and it is hereby, entered in favor of the defendants Mullen, Residential Brokers, Cassidy & Gladd against the Plaintiff, Robert W. Ludwig, Jr., and it is further,

ORDERED, that the defendant which has legal title to the property known as Lot 7, Alexandria Overlook, Prince George's County, Maryland be, and is hereby, Ordered and directed to convey title to Robert W. Ludwig, Jr., upon payment by Robert W. Ludwig, Jr., to that defendant, the sum of $167,918.28, and it is further,

ORDERED, that Judgment be, and it is hereby, entered in favor of the defendant, conveying title, for interest at the legal rate on the $167,918.28 from May 1, 1986 to the date of settlement on this property, and it is further,

ORDERED, that Plaintiff's Motion for costs and counsel fees be, and it is hereby, denied, and it is further,

ORDERED, that Robert W. Ludwig, Jr. settle on this parcel of real estate, on or before August 31, 1987.

PERRY G. BOWEN, JUDGE

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

ROBERT W. LUDWIG, JR.	:	
Plaintiff,	:	
vs.	:	Case No. CAE 86-06873
EVERGREEN OVERLOOK, INC. et al.	:	
Defendants.	:	

ORDER

UPON CONSIDERATION of the Motion for Reconsideration filed herein and the Opposition thereto, it is by the Circuit Court for Prince George's County, this 26th day of August, 1987,

ORDERED that the Motion be and hereby is DENIED.

PERRY G. BOWEN, JUDGE
CIRCUIT COURT
PRINCE GEORGE'S COUNTY, MD

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

ROBERT W. LUDWIG, JR.	*	
Plaintiff	*	
	*	
vs.	*	Case No. CAE 86-06873
	*	
ROCCO LUPPINO, et al.	*	
Defendants	*	

FINAL ORDER

Upon consideration of Plaintiff's Renewed Motion to Revise Judgment, it is this 30th day of December, 1988, by the Circuit Court for Prince George's County, Maryland,

ORDERED, that Plaintiff's Renewed Motion to Revise Judgment be, and hereby is, denied for lack of jurisdiction, and it is further,

ORDERED, that final judgment be, and hereby is, entered in favor of the Defendant, Rocco Luppino, against the Plaintiff, Robert W. Ludwig, Jr. for interest and costs, and it is further,

ORDERED, that a monetary judgment be entered against Robert W. Ludwig, Jr., in favor of the Defendant, Rocco Luppino in the amount of $39,786.48, which reflects interest and costs due to and through December 9, 1988. (The gross amount of $45,936.38 was reduced by a credit of $6,150.00 for rent received), and it is further,

ORDERED, that this judgment will continue to accrue interest at the legal rate until settlement on the property, and it is further,

ORDERED, that the Plaintiff, Robert W. Ludwig, Jr., has forfeited any right to purchase the property located at 17 East

Alexandria Drive, Oxon Hill, Maryland, and Rocco Luppino may sell, transfer, or convey the real property free of any lien, or claimed lien, of Robert W. Ludwig, Jr.

/s/Audrey Melbourne,
JUDGE

Copies to:

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IN THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF OF APPELLANT

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IN THE COURT OF SPECIAL APPEALS OF MARYLAND

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IN THE COURT OF SPECIAL APPEALS OF MARYLAND

ROBERT W. LUDWIG, JR.	*	
Appellant	*	
	*	
v.	*	No. 1515
	*	
EVERGREEN OVERLOOK, INC., ET AL.	*	September Term
Appellees	*	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR RECONSIDERATION

I. The Court Has Before It In The Record Extract Sufficient Information With Which To Render A Decision.

...

II. Appellant Stands Ready, Willing And Able To Supplement The Record Extract Immediately Upon The Granting Of This Motion For Reconsideration.

...

III. To Dismiss This Appeal Would Work A Substantial Injustice Upon Appellant.

...

To allow Appellant to supplement the record extract would work no prejudice upon any of the parties hereto or to the Court. Where appellee has suffered no injury or where the appeal presents other questions which do not depend on the alleged defects, the appeal should not be dismissed. *Gwynn Oak Park v. Becker,* 177 Md. 528, 10 A.2d 625, 627 (1940); *Velasco v. Protestant Episcopal Church,* 200 Md. 634, 92 A.2d 373, 375 (1952). *Also see Sullivan v. Insurance Commissioner,* 291 Md. 277, 434 A.2d 1024 (1981), which provides that the right of appeal "is a valuable

right secured to the parties, where they are vigilant, and not to be forfeited, unless were they are guilty of such laches as the law will not sanction..." 291 Md. 277, 434 A.2d at 1028. Dismissal on less than such circumstances affects the fundamental fairness of the proceedings and is a denial of due process. *Id.*, at 1030.

...

Respectfully submitted,
BLANK & MOORSTEIN

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(301) 279-2200

IN THE COURT OF APPEALS OF MARYLAND

ROBERT W. LUDWIG, JR.	*	
Petitioner	*	
	*	September Term, 1988
v.	*	
	*	Petition Docket No. 240
EVERGREEN OVERLOOK, INC., et al.	*	
Respondents	*	

PETITION FOR WRIT OF CERTIORARI

. . .

III. THE DISMISSAL DENIES PETITIONER A VALUABLE RIGHT TO APPEAL AND APPLIES MD. RULE 1028 IN A MANNER WHICH DENIES DUE PROCESS

The right of appeal "'is a valuable right secured to parties, where they are vigilant, and not to be forfeited, unless where they are guilty of such laches as the law will not sanction.'" *Sullivan v. Insurance Commissioner*, 291 Md. 277, 284, 434 A.2d 1024 (1981). Dismissal on less than such circumstances affects the "fundamental fairness of the proceeding" and "is a denial of due process." 291 Md. at 287.

As in *Sullivan* and its companion cases, *Uhler v. Real Properties, Inc.*, 289 Md. 7, 421 A.2d 966 (1980) and *Ayre v. State*, 291 Md. 155, 433 A.2d 1150 (1981), reversing the lower court's erroneous application of Md. Rules 1013, 1025 and 1035, the lower court has again misapplied an important Maryland Rule. The dismissal would have been harsh even if *mandatory* material had been omitted from the extract. In this case, however, where all mandatory material was supplied, the result is exceedingly harsh and unjustified for a Rule which leaves much to the discretion of counsel and has never been applied to require pleadings in all cases.

The result reached thus also constitutes a misapplication of Md. Rule 1028 i.2 and Md Rule 1035 a.2 and b.5 under which the lower court exercised its discretion to dismiss the appeal. As this Court has applied its corresponding rules in a long line of cases culminating in *Wyndham v. Haines*, 305 Md. 269, 503 A.2d 719 (1986), "the sanctions for violation of Rule 828 b [identical to 1028 b] as provided by Rule 828 i2 [1028 i2] are discretionary," and dismissal is unwarranted except in "egregious" cases. 305 Md. at 277 n.7. Exercising traditional caution, the Court therein declined to dismiss for alleged failure to include a part of the record. *See also Colonial Carpets, Inc. v. Carpet Fair, Inc.*, 36 Md. App. 583, 593, 374 A.2d 419 (1977) ("instant case ... does not present [an] 'egregious omission' ... of such magnitude as to require a summary dismissal"); *Anderson v. Hull*, 215 Md. 476, 482, 138 A.2d 875 (1958) ("appellants' derelictions were [not] so serious as to call for a dismissal").

Such application of the Rules by the Court of Special Appeals constitutes an unconstitutional denial of due process. As has been recognized by a sister court:

> Although the State is not constitutionally required to provide a right to appellate review, once the State chooses to provide such a right it must comply with the dictates of the constitution, including the requirements of due process. *See Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 838-39, 83 L.Ed.2d 821 (1985); *see also Lindsey v. Normet*, 405 U.S. 56, 77, 92 S.Ct. 862, 876, 31 L.Ed.2d 36 (1972).

Ladd v. Coleman, 517 A.2d 811, 813 (N.H. 1986). Due process requires that once a state has created a right of appeal, it must offer each litigant "a fair opportunity to obtain an adjudication on the merits." *Evitts v. Lucey*, 469 U.S. 387, 405 (1985). *See also Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1154 (2d Cir. 1986), *rev'd on other grounds*, __ U.S.__, 107 S.Ct. 1519 (1987). Recently this Court, citing *Texaco* and acknowledging this constitutional argument, interpreted Md. Rule 1018 in accordance with "the familiar principle that a rule will be construed to avoid

a possible conflict with the Constitution whenever that course is reasonable." *O'Donnell v. McGann,* 310 Md. 342, 529 A.2d 372, 376 (1987).

A right of appeal otherwise given also may not be arbitrarily denied. *See Lindsay v. Normet,* 405 U.S. 56, 77 (1972)("When an appeal is afforded..., it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause.") Under the Maryland reported decisions, even egregious violations of the applicable rules have not resulted in dismissal. *See Nisos v. Nisos*, 60 Md.App. 368, 375-76, 483 A.2d 97 (1984).

The trial judge in this case erred in denying Petitioner the right ot jury trial secured by Article 23 of the Maryland Declaration of Rights and by the Seventh Amendment of the U.S. Consitution. The error was compounded when the Court of Special Appeals subsequently dismissed the appeal, upon a misapplication of the applicable rules, thus denying Petitioner further rights guaranteed by Article 24 and by the Fourteenth Amendment. In order to avoid irreparable injury to Petitioner and to other litigants, Petititoner urges this Honorable Court to construe the Maryland Rules in a sensible manner so as not to render the appeal process fundamentally unfair and meaningless.

Respectfully submitted,
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Counsel for Petitioner

Of Counsel:
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IN THE COURT OF APPEALS OF MARYLAND

ROBERT W. LUDWIG, JR.	*	
Petitioner	*	
	*	September Term, 1988
v.	*	
	*	Petition Docket No. 240
EVERGREEN OVERLOOK, INC. et al.	*	
Respondents	*	

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

...

Petitioner's valuable right of appeal and to due process was lost through a clear abuse of discretion. If the court below required the pleadings, Petitioner should have been afforded relief under Rules 1028 i.2 and .3 and 1050 to furnish them, and in any event should have received a review of the other half of his appeal.

CONCLUSION

The issues in this matter affect not only the Petitioner but members of the Maryland Bar who practice in the Courts under these Rules, and thus are of general public importance. The problem of providing a concise yet adequate extract is a recurring one, and cases frequently arise where professional judgment is exercised in conscientious attempts to comply with the Rules. It is unconscionable that a citizen's right of appeal should be foreclosed despite conscientious efforts, when appropriate avenues are available to correct an omission in the record. The disposition of the court below should be corrected by the Court by a sensible and fair application of its Rules, consistent with the

public interest and its supervisory responsibility to see that its Rules are respected and followed.

Respectfully submitted,
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Of Counsel:
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(2)

No. 88-1140

Supreme Court, U.S.
FILED
FEB 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT W. LUDWIG, JR.,
Petitioner,

v.

EVERGREEN OVERLOOK, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Special Appeals of Maryland

---

BRIEF IN OPPOSITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

32 pp

QUESTION PRESENTED FOR REVIEW

Did the Maryland Court of Special Appeals abuse its discretion or deny petitioner due process or equal protection of the law, provided by the U.S. Constitution, when it dismissed petitioner's appeal for failure to comply with a Maryland Rule which mandates that the pleadings be included in an extract where they are material to the determination sought on appeal?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1140

ROBERT W. LUDWIG, JR.,
Petitioner,

v.

EVERGREEN OVERLOOK, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Special Appeals of Maryland

---

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Originally, this was an action by an attorney (petitioner), admitted in the District of Columbia, seeking specific performance of an alleged real estate contract. Later, petitioner amended his claim to include claims for fraud and tortious interference with said contract. The petitioner signed an agreement which was never signed by the developer, Evergreen Overlook, Inc. (hereinafter Evergreen). A One Thousand Dollar ($1,000) check was given by petitioner to Evergreen. Petitioner has acknowledged that the check was never deposited or cashed by Evergreen.[1]

---

[1] The following persons and entities were parties before the Maryland Court of Special Appeals: Robert W. Ludwig, Jr. (Appellant); Evergreen Overlook, Inc.; Residential Brokers, Ltd., Rocco Luppino; Judith H. Mullen, with John Cassidy, Kevin I. Gladd as substitute trustees (Appellees). Evergreen Overlook, Inc. is a Maryland Cor-

Just prior to the scheduled settlement date in April of 1986, a dispute arose regarding the cost of extras which had been added to the original building plan of the house. Evergreen offered, in the alternative, to proceed to settlement, and to escrow an amount which represented the reasonable sum in dispute at the time. The petitioner refused this offer and filed his original suit on the date scheduled for settlement. In fact, service of process was made at the place and time scheduled for settlement.

A construction loan had been secured by Evergreen to build the house. In August of 1986 the lender sought to collect on the note. To protect his credit rating and recoup equity, Mr. Luppino (this respondent) who personally guaranteed the note, resigned as president of Evergreen, paid off the loan and foreclosed on the property. It was after these actions that petitioner amended his original complaint to include counts of fraud and tortious interference with contract against respondents.

At trial, the jury found that a contract existed, and set the price of the property to include some of the extras in dispute. The trial judge ordered specific performance and directed this respondent to convey title to the petitioner upon payment of the jury-determined price by a particular date. The judge also ordered petitioner to pay Luppino a certain amount of interest which had accrued on the purchase money to the property. Additionally, the judge dismissed all of petitioner's claims alleging fraud and tortious interference of contract, finding petitioner did not present adequate admissible evidence on these claims. (See App. pp. 4a-5a, 7a-8a). Petitioner was not satisfied with the jury verdict or the judgment and Order of the Court. A motion for reconsideration was denied by the trial court. (App. p. 6a). The language in

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poration wholly owned by Ms. Mullen. Residential Brokers, Ltd. is a Virginia Corporation wholly owned by an officer of Evergreen Overlook, Inc.

the Order of Judgment and the Final Order of the trial court is strong against petitioner. (App. pp. 4a-5a, 7a-8a).

Seven issues were appealed to the Maryland Court of Special Appeals.[2]

Because petitioner did not include the multiple pleadings in its extract prepared for appeal, and because it was impossible for the court to determine what cause of action had been pled without the benefit of these, the Court of Special Appeals chose to exercise its discretionary authority and dismissed petitioner's appeal pursuant to Maryland Rule 1035 for failure to comply with Maryland Rule 1028.[3] (App. pp. 9a-10a).

Once again, petitioner was unhappy with the court's decision. A motion for reconsideration was denied (App. p. 11a), and petitioner appealed to the Maryland Court of Appeals which refused to grant a writ of certiorari stating that review was "not desirable nor in the public interest." (App. p. 12a). This brings us to the current petition for writ which is repetitive, unnecessary, and duplicative of issues already decided by lower courts and burdensome to respondents.

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[2] The seven issues appeal d were: whether there was seufficient evidence in the trial record to preclude directed verdicts denying a jury trial on the claims of (1) fraud, (2) tortious interferęnce, and (3) punitive damages. Petitioner assigned as error the trial court's application of specific performance law which resulted in (4) an award of purchase money interest to respondents; (5) denial of damages; (6) contract entitlements to petitioner; and (7) the failure to sanction respondents with costs and attorneys' fees for what petitioner claimed were litigation abuses.

[3] Petitioner claimed that respondents abused pelading procedures. However, petitioner failed to include the pleadings in their extract as evidence of such abuse.

REASONS FOR DENYING WRIT

I. THE MARYLAND COURT OF SPECIAL APPEALS DID NOT ABUSE ITS DISCRETION

No unfairness has resulted to petitioner from the decisions of state courts in this case. In fact, petitioner was afforded the principal relief sought when the trial court awarded specific performance. Petitioner sought justice through the judicial system, and received a jury trial. The jury decided that a contract existed and the price petitioner should pay.[4] Petitioner received what he initially sought—the opportunity to buy the house. Not satisfied, the petitioner exercised his right to appeal.

Even though petitioner may have had a state-created right of appeal, the Maryland Rules of Procedure set forth guidelines, interpreted strictly by Maryland Courts, which must be followed by appellants in preparing their extracts for appeal. Rule 1028 b. requires that,

> ". . . [s]o much of the . . . pleadings . . . as is material to any question or determination which depends on the sufficiency of the evidence, pleadings . . ."

shall be included in the record extract. (emphasis added). (App. p. 1a). And, Rule 1035 gives the Court of Special Appeals specific discretionary authority to dismiss an appeal on its own motion should the court determine that the extract does not comply with Rule 1028 b. (See App. pp. 1a-3a).

Despite petitioner's assertions to the contrary, the extract presented to the Court of Special Appeals did not contain sufficient material for the Court to determine if

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[4] The jury decided that $167,918.28 was a fair price for petitioner to pay. (App. pp. 4a-5a).

the trial court had acted properly with regard to the seven issues on appeal.[5]

If a court does not know what the factual allegations are, a determination on the sufficiency of the proof of these facts cannot be made. Rule 2-303 of the Maryland Rules of Civil Procedure requires the pleadings to set forth those facts necessary to show the pleader's entitlement to relief. As a rule, the allegations in the complaint must be sufficiently proven by admissible evidence. *Rogers v. Maryland National Capital Park and Planning Commission*, 253 Md. 687, 253 A.2d 713, 714 (1969); *Huber v. State*, 2 Md. App. 245, 234 A.2d 264, 274 (1967). Respondent argues, it is absolutely impossible to measure evidence in a civil action if you do not know the substance of the factual allegations.[6]

The Maryland Court of Appeals has explicitly said that it *intends* to,

> "deal summarily . . . with cases where the record extract is so inadequate or so slanted in favor of Appellant's contentions as to be seriously misleading." (Emphasis added). *Bornstein v. State Tax Commission*, 227 Md. 331, 176 A.2d 859, 861 (1962).

The discretionary nature of Rule 1035 was discussed by the Maryland Court of Special Appeals in *Kemp Pontiac Cadillac, Inc. v. S&M Construction Co.*, 33 Md. App.

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[5] Petitioner contends that the only paper mandated by Rule 1028 b. to be included in an extract is the judgment and charge of the court below. Because Petitioner included these plus other pertinent testimony, and since no issue of sufficiency of the pleadings was raised during litigation, petitioner contends that the pleadings were not necessary or material to a decision on the issues on appeal.

[6] Petitioner argued before the Court of Special Appeals that sufficiency of the evidence questions are measured against legal elements of the particular claim, under Maryland law, not against the pleadings. But, petitioner confused the court when it claimed that respondents fraudulently induced him to enter a contract on one hand and questioned the existence of a contract on the other.

576, 365 A.2d 1021 (1976). Judge Digges commented on Rule 828 b.1 whose language is identical to Rule 1028 b. and stated:

> "The cases are in legion in this Court in support of our authority not to decide issues not presented in conformity with this rule." *Caroline v. Reicher*, 269 Md. 125, 304 A.2d 831, 837 (1973).

See also, *Seek v. Winters*, 270 Md. 715, 313 A.2d 453 (1974); *A.S. Abell Co. v. Skeen*, 265 Md. 53, 288 A.2d 596 (1972).[7]

Moreover, the Court of Special Appeals clearly expressed in *Eldwick Homes Assn., Inc. v. Pitt*, 36 Md. App. 211, 373 A.2d 957 (1977), that "the Court is not required to dig through the record to find those materials which counsel should have printed in the record abstract." *Id.* at 958. Petitioner argues that it was significant that the pleadings were contained in the record before the Court. *Eldwick* clearly refutes this contention.

It is absolutely insignificant that no reported Maryland decision has ever explicitly required that pleadings be included in the extract for an appeal. Maryland Courts have warned repeatedly (with regard to Rule 1028 b.) that appellants must print in the appendix *all* that the court has to have before it, if they expect the court to decide an issue, or a dismissal can result. *Sunshine Laundry Corp. v. White*, 197 Md. 582, 90 A.2d 1 (1957);

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[7] Maryland Courts, when making decisions regarding rules almost identical in tone to Rule 1028 b., have said that it is the appellant's duty to print in the appendix *all* materials needed by a court to decide whether or not an issue existed for submission to a jury. These courts have all said that *all* material is *not* presented when the appellant reproduces in the appendix only what is favorable to his argument, and ignores material that militates against him. *Gmurek v. Kajader*, 203 Md. 437, 101 A.2d 204, 206 (1953); *Prime Contractors, Inc. v. City of Baltimore*, 241 Md. 54, 215 A.2d 214 (1965); *Silverman v. Ruddle*, 234 Md. 353, 199 A.2d 196 (1964); *Platt v. Wilson*, 62 A.2d 191 (1948).

Kemp Pontiac Cadillac, supra; Eldwick Homes Assn., supra; Bornstein, supra.

As Judge Prescott, later Chief Judge of the Maryland Court of Appeals, said of counterpart Rule 828:

> "This rule is clear, definite and certain; there is little excuse for having an attorney's compliance therewith questioned." *McIntyre v. Byrne*, 217 Md. 71, 74, 141 A.2d 692, 693 (1958).

See also, *Kemp Pontiac Cadillac* at 365 A.2d 1022.

Even this Court has recognized that the extreme sanction of dismissal by lower courts is justified when clear, procedural rules are ignored and, in fact, stated,

> ". . . must be available . . . in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S. Ct. 2778 (1976).

See also, *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830 (1985); *Ackerman v. U.S.*, 340 U.S. 193, 198, 71 S. Ct. 209, 211 (1950).

The Ninth Circuit holds that it is not enough to show that grant of a motion to set aside summary dismissal may have been permissible. The decision to deny a motion for reconsideration must have been unwarranted to equal abuse of discretion. *Plotkin v. Pacific Tel. and Tel. Co.*, 688 F.2d 1291, 1293 (9th Cir. 1982). See also, *The Nestle Company, Inc. v. Chester's Market, Inc. and Saccone's Toll House, Inc.*, 596 F. Supp. 1445, 1450-51, (D. Conn. 1984).

It is not unconscionable nor is it inconsistent with federal due process and/or equal protection standards established by this Court that the Maryland Courts dismissed petitioner's claims on appeal for failure to comply with a rule so clear as Rule 1028—A Rule made even more clear by explicit holdings of the Maryland Courts, and

not refuted by federal authority. No discretion was abused by the Maryland Court of Special Appeals or any other Maryland Court acting in the face of such clear authority.

II. THE MARYLAND COURT OF SPECIAL APPEALS DID NOT VIOLATE THE DUE PROCESS OR THE EQUAL PROTECTION CLAUSES OF THE CONSTITUTION BY DISMISSING PETITIONER'S APPEAL

It is true that when a state opts to act in a field where its action has discretionary elements, it must act in accord with the dictates of the Constitution. *Evitts* at 401. See also, *Lindsey v. Normet*, 405 U.S. 56, 92 S. Ct. 862 (1972). However, this Court has consistently held:

> "The right of appeal may be accorded by the state . . . upon such terms as in its wisdom may be deemed proper." *McKane v. Durston*, 153 U.S. 684, 687-688, 14 S. Ct. 913, 914-915 (1894); *Griffin v. Illinois*, 351 U.S. 12, 18, 76 S. Ct. 585, 590 (1956).

Furthermore, this Court has specifically stated:

> "The right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance." *Ohio ex. rel. Bryant v. Akron Metropolitan Park District*, 281 U.S. 74, 80, 50 S. Ct. 228, 230 (1930); *McKane, supra.*

In other words, if a full and fair trial is provided, this Court holds that the Constitution does not require a state to provide appellate review at all. *Jones v. Barnes*, 103 S. Ct. 3308, 3312 (1983); *Lindsey* at 876; *Griffin* at 18; *Evitts* at 400.[8]

The bottom line is that a full and fair trial on the merits has been provided on all issues to this litigation,

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[8] See also, *District of Columbia v. Clawans*, 300 U.S. 617, 627, 57 S. Ct. 660, 664 (1937); *Ohio ex rel. Bryant* at 80; *Reetz v. Michigan*, 188 U.S. 505, 508, 23 S. Ct. 390, 392 (1903); *McKane* at 687-688. The *Lindsey Court* specifically confirmed the validity of this principle and the similar holding in each of these earlier cases.

and a rehashing of any of the issues in this case is unnecessary and duplicative. But, petitioner continues to cloud title to the property through needless appeals. Indeed, the Maryland Court of Appeals dismissed petitioner's appeal as "not desirable nor in the public interest." (App. p. 12a).

Petitioner concedes that federal courts have upheld the extreme sanction of dismissal in cases based on violations of procedural rules. *National Hockey League, supra.* See also, *Ackerman v. U.S.*, 340 U.S. 193, 71 S. Ct. 209, (1950); *Plotkin, supra; General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1211 (8th Cir. 1973). Specifically, where "bad faith" in failing to follow a rule is apparent, this Court has upheld dismissal of the appeal. Indeed, this Court has said that such a sanction "must be available." *National Hockey League* at 643.

Maryland Courts have been clear in their interpretation of the applicable state rules. The Maryland Court of Special Appeals has set an example by repeatedly dismissing appeals where appellants' record extracts were "patently insufficient for a determination of the questions raised." *Prime Contractors, Inc.*, at 216 (citation omitted). And, the Maryland Court of Appeals emphatically warned in *Bornstein* that ". . . drastic action might result if omissions on the part of appellant were deliberate and intended to violate or evade the rule, even where the material is supplied." *Bornstein* at 1026.

To illustrate his theory that the present case presents a constitutional violation, petitioner cites cases where this Court decided the equal protection clause was violated because criminal, indigent defendants were subjected to state procedural rules which distinguished between rich and poor and, thus, left indigent defendants at a disadvantage on appeal. *Evitts v. Lucey, supra; Lindsey v. Normet, supra.* No such set of facts exists in the present action. Furthermore, this Court in *Evitts* clearly recognized,

> "if a state chooses to dismiss an appeal when an . . . attorney has violated local rules, it may do so, if such action does not intrude on clients due process rights." *Evitts* at 399.

Petitioner also looks to decisions of this Court with regard to the Federal Rules of Civil Procedure (F.R.C.P.) as a guide in the present action. In so doing, petitioner recognizes that this court has upheld dismissals for non-compliance with federal procedural rules. *National Hockey League, supra.* See also, *Ackerman, supra.*[9] Furthermore, the instant issue is application of state-created right of appeal and state-created rules in compliance therewith. Federally-created right of appeal and the F.R.C.P. is a separate and distinct area of law.

Moreover, Justice Rehnquist pointed out in *Evitts*:

> "This Court's decisions have *not* imposed *any* procedural requirements on state appeals other than to bar procedures that operate to accord indigents a narrower scope of appellate review than non-indigents." (Rehnquist, J., dissenting) (emphasis added), *Evitts* at 406-407.

And, the Ninth Circuit upheld a dismissal even where the procedural error was committed by the court and not the appellant. *Thomassen v. U.S.*, 835 F.2d 727 (9th Cir. 1988).

In reviewing this case, the Maryland Court of Special Appeals held that Maryland Rule 1028 b.1 directs peti-

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[9] In one F.R.C.P. case cited by petitioner, this court recognized that the record showed evidence of fraud perpetrated by a large corporation on a little old lady who held her life savings in stock with the corporation. This court refused to uphold dismissal pursuant to F.R.C.P. 23 for her failure to verify with full knowledge what she had pled in her complaint. *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 383 (1966). In the present case, no evidence of fraud exists. It is clear that this respondent resigned as president of Evergreen and foreclosed on the property only to save his credit rating and to recoup the equity he had placed in the property by personally signing the construction note. The trial court's decision on these matters is just and should not be questioned. (See App. pp. 4a-8a).

tioners to include in the extract such parts of the record as may be reasonably necessary for the determination of questions presented on apeal. (See App. p. 9a).

Further, it pointed out that it was merely exercising the discretionary authority conferred on it by Rule 1028 i.2, which specifically allows the Court to dismiss an appeal which violates section b of the rule. (See App. p. 10a).

Section i.3 of the same rule confers upon the court the power to order that the printed extract be corrected when it deems appropriate. (App. p. 2a). It is obvious that this section of the rule is also *discretionary*. The Court is not required to exercise that authority. It is clear that the Court of Special Appeals either felt that the omission in the present case was not inadvertent, or it was not willing to take the risk that prejudice might result to respondents in the absence of review of the complicated pleadings of this case. It could be that the Court of Special Appeals wanted to avoid further time and expense on this matter in light of the strong language used by the trial court. (See App. pp. 4a-8a, 9a-10a). By the provisions of Rules 1028 i.2 and 3 and Rule 1035, it was the Court's prerogative to dismiss. (See App. pp. 1a-3a; 9a-10a).

The *Golden Rule* of appellate review is, simply stated, an appellate court will not challenge the decision of a lower court in the absence of an abuse of discretion. *Skirven v. Skirven*, 140 A.2d 205, 154 Md. 267 (1928). Indeed, the Maryland Court of Appeals has consistently held that,

> "Questions within the discretion of trial court are much better decided by that court than by appellate courts, and decisions of trial judges will only be disturbed where it is apparent that some serious error or abuse of discretion . . . has occurred." *Northwestern Nat. Ins. Co. v. Samuel R. Rosoff, Ltd.*, 73 A.2d 461, 195 Md. 421 (1950). See also, *B&K Ren-*

tal & Sales Co., Inc. v. Universal Leaf Tobacco Co., et al, 535 A.2d 492, 496, 73 Md. App. 530 (1988).

The Maryland Court of Special Appeals follows the principle that,

> "Discretion with which all courts determine whether good cause has or has not been shown for noncompliance is broad and involves one of the most important judicial functions; ruling made in exercise of that discretion is entitled to utmost respect and should not be overturned by an appellate court unless there is clear showing that discretion was abused . . ." *Madore v. Baltimore County*, 367 A.2d 54, 34 Md. App. 340 (1976). See also, *State v. Green*, 458 A.2d 487, 490 (Md. App. 1983).

This Court, too, follows this rule of respect, and has affirmed that a trial court's discretionary decision will only be disturbed if the decision is *arbitrary*. The D.C. Circuit held that a decision is arbitrary only if exercised for an erroneous reason, and this Court denied certiorari. *National Ben. Life Ins. Co. v. Shaw-Walker Co.*, 111 F.2d 497, 71 App. D.C. 276, certiorari denied 61 S. Ct. 35, 331 U.S. 673 (1940). Petitioner's claims were dismissed pursuant to a rule backed up by a string of decisions of Maryland Courts not refuted by federal courts—clearly not arbitrary.

There was no error of discretion by the trial court in dismissing non-meritorious claims of petitioner. Nor was there abuse of discretion by the Court of Special Appeals in dismissing petitioner's appeal pursuant to state authority and not contrary to federal authority. Likewise, the Maryland Court of Appeals was not out of line to dismiss petitioner's claims.

There is no due process issue present in the instant appeal. The Constitution does not provide the absolute right to an appeal, and even if there is a state-created right to an appeal for appellants in Maryland, in no way

did the Maryland Courts abuse their discretion in reviewing the facts of this case. With the absence of abuse of discretion by the lower state courts which have considered the issues present, there is no constitutional violation. The trial court rendered a fair decision in this case. Trial by jury has been had and justice has been served. Any other decision by any other court would be unfair.

CONCLUSION

This case is not properly before this Honorable Court, thus, no writ of certiorari should be granted.

Respectfully submitted,

THOMAS A. FARRINGTON *
RICHARD R. "PAGE" WYROUGH
THE LAW OFFICES OF
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Rocco Luppino

Dated: February 9, 1989

* Counsel of Record

APPENDIX

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APPENDIX

RULES INVOLVED

Rules 1028 and 1035 of the Maryland Rules of Procedure provide in pertinent part:

Rule 1028. Printed Record Extract in Civil Cases.

a. Appellant to Print.

In civil cases, unless a statement is filed pursuant to Rule 1029 b or unless otherwise ordered by this Court, the appellant shall cause to be printed, either as a separate volume or as an appendix to his brief, extracts of the record which shall include the parts thereof provided for by section b of this Rule arranged in the order in which the same appear in the record. . . .

b. Contents.

1. What to be Included.

The printed extract shall contain such parts of the record as may reasonably be necessary for the determination of the questions presented by the appeal, and shall include:

(a) The judgment appealed from, together with the opinion or charge of the lower court, if any.

(b) So much of the evidence, pleadings or other parts of the record as is material to any question the determination of which depends upon the sufficiency of the evidence, pleadings or other matter contained in the record to sustain any action, ruling, order or judgment of the lower court.

(c) Such other parts of the record as may be designated by the parties pursuant to section c. of this Rule.

. . .

i. Penalties—Correction.

1. Violation of Section a.

For violation of section a. of this Rule this Court may dismiss the appeal, or make any other appropriate order with respect to the case, including an order that an improperly printed appendix or printed extract be reprinted at the expense of the counsel for the party whose appendix or printed extract was improperly printed.

2. Violation of Section b.

For violation of section b. of this Rule this Court may require that additional portion of the record be printed or otherwise furnished, or it may dismiss the appeal, or make any other appropriate order with respect to the case.

3. Inadvertent Errors.

Inadvertent omissions or misstatements in the printed extract or in any appendix may be corrected by direction of this Court on application or of its own motion.

Rule 1035. Dismissal of Appeal.

a. By the Court.

1. From Pro Forma Orders.

. . .

2. Any Other Cause.

This Court may, on its own motion, dismiss an appeal for any cause set forth in section b of this Rule.

b. On Motion.

On motion filed by any party, an appeal may be dismissed for any of the following reasons:

. . .

5. The contents of the printed record extract do not comply with section b. of Rule 1028 (Printed Record Extract in Civil Cases).

. . .

Rule 2-303 of the Maryland Rules of Procedure provides in pertinent part:

Rule 2-303. Form of Pleadings.

b. Contents.

Each averment of pleading shall be simple, concise, and direct . . . A pleading shall contain . . . such statements of fact as may be necessary to show the pleader's entitlement to relief. . .

IN THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY, MARYLAND

Case No. CAE 86-06873

ROBERT W. LUDWIG, JR.,
Plaintiff

vs.

EVERGREEN OVERLOOK, INC., *et al.*,
Defendants

ORDER

UPON CONSIDERATION, of the testimony and evidence at the trial of this case, and the jury verdict on special issues, it is by the Circuit Court for Prince George's County, this 26th day of August, 1987.

ORDERED, that the Motions for Judgment by the defendants Mullen and Residential Brokers, be granted, and it is further,

ORDERED, that Judgment be, and it is hereby, entered in favor of the defendants Mullen, Residential Brokers, Cassidy & Gladd against the Plaintiff, Robert W. Ludwig, Jr., and it is further,

ORDERED, that the defendant which has legal title to the property known as Lot 7, Alexandria Overlook, Prince George's County, Maryland be, and is hereby, Ordered and directed to convey title to Robert W. Ludwig, Jr., upon payment by Robert W. Ludwig, Jr., to that defendant, the sum of $167,918.28, and it is further,

ORDERED, that Judgment be, and it is hereby, entered in favor of the defendant, conveying title, for interest at the legal rate on the $167,918.28 from May 1,

1986 to the date of settlement on this property, and it is further,

ORDERED, that Plaintiff's Motion for costs and counsel fees be, and it is hereby, denied, and it is further,

ORDERED, that Robert W. Ludwig, Jr. settle on this parcel of real estate, on or before August 31, 1987.

PERRY G. BOWEN
Judge

IN THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY, MARYLAND

Case No. CAE 86-06873

ROBERT W. LUDWIG, JR.,
Plaintiff

vs.

EVERGREEN OVERLOOK, INC., *et al.*,
Defendants

ORDER

UPON CONSIDERATION of the Motion for Reconsideration filed herein and the Opposition thereto, it is by the Circuit Court for Prince George's County, this 26th day of August, 1987,

ORDERED that the Motion be and hereby is DENIED.

PERRY G. BOWEN
Judge
Circuit Court
Prince George's County, Md.

IN THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY, MARYLAND

Case No. CAE 86-06873

ROBERT W. LUDWIG, JR.,
Plaintiff

vs.

ROCO LUPPINO, *et al.*,
Defendants

FINAL ORDER

Upon consideration of Plaintiff's Renewed Motion to Revise Judgment, it is this 30th day of December, 1988, by the Circuit Court for Prince George's County, Maryland.

ORDERED, that Plaintiff's Renewed Motion to Revise Judgment be, and hereby is, denied for lack of jurisdiction, and it is further,

ORDERED, that final judgment be, and hereby is, entered in favor of the Defendant, Rocco Luppino, against the Plaintiff, Robert W. Ludwig, Jr. for interest and costs, and it is further,

ORDERED, that a monetary judgment be entered against Robert W. Ludwig, Jr., in favor of the Defendant, Rocco Luppino in the amount fo $39,786.48, which reflects interests and costs due to and through December 9, 1988. (The gross amount of $45,936.38 was reduced by a credit of $6,150.00 for rent received), and it is further,

ORDERED, that this judgment will continue to accrue interest at the legal rate until settlement on the property, and it is further,

ORDERED, that the Plaintiff, Robert W. Ludwig, Jr., has forfeited any right to purchase the property located at 17 East Alexandria Drive, Oxon Hill, Maryland, and Rocco Luppino may sell, transfer, or convey the real property free of any lien, or claimed lien, of Robert W. Ludwig, Jr.

/s/ Audrey Melbourne
Judge

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1515

September Term, 1987

ROBERT W. LUDWIG, JR.

v.

EVERGREEN OVERLOOK, INC., *et al.*

Gilbert, C.J.
Bloom,
Smith, Maarvin H. (Retired,
specially assigned),

JJ.

PER CURIAM

Filed: May 20, 1988

Pursuant to Md. Rule 1035 a. 2 and b.5, we dismiss the appeal of Ludwig v. Evergreen Overlook, Inc., et al. We exercise the prerogative conferred upon us by Md. Rule 1028 i. 2, because the record extract required by Rule 1028 fails to include any of the pleadings in the action begun in the Circuit Court for Prince George's County.

Maryland Rule 1028 b. 1 provides:

> "The printed extract shall contain such parts of the record as may reasonably be necessary for the determination of the questions presented by the appeal, and shall include:

(a) The judgment appealed from, together with the opinion or charge of the lower court, if any.

(b) So much of the evidence, pleadings or other parts of the record as is material to any question the determination of which depends upon the sufficiency of the evidence, pleadings or other matter contained in the record to sustain any action, ruling, order or judgment of the lower court.

(c) Such other parts of the record as may be designated by the parties pursuant to section c. of this Rule."

Ludwig contends that the trial court erred in dismissing his claims for damages for fraud and tortious interference with a contract. Further, he claims punitive damages.

The record extract is devoid of the pleadings necessary for us to review the trial court's actions. In his brief, Ludwig refers to a complaint, an amended complaint, a supplement to the amended complaint, a second supplement to the amended complaint, as well as the appellees' answers to each. None of those writings are included in the record extract. Hence, the extract provides us with nothing to review. We have previously stated in Eldwick Homes Association, Inc. v. Pitt, 36 Md. App. 211, 212 (1977). "[W]e are not required to ferret out from the record those materials which counsel should have printed in the abstract." We reiterate what we said in Eldwick, and accordingly we dismiss the appeal.

APPEAL DISMISSED.
COSTS TO BE PAID BY APPELLANT

MANDATE

COURT OF SPECIAL APPEALS

No. 1515, September Term, 1987

ROBERT W. LUDWIG, JR.

v.

EVERGREEN OVERLOOK, INC., *et al.*

JUDGMENT: May 20, 1988: Per Curiam filed. Appeal dismissed. Costs to be paid by appellant.

June 15, 1988: Motion for Reconsideration filed by counsel for the appellant. June 17, 1988: Motion for Reconsideration denied.

June 21, 1988: Mandate issued.

STATEMENT OF COSTS:

In Circuit Court: for Prince George's County CAE86-06873

Record	40.00
Stenographer Costs	1342.25
Total	1382.25*
In Court of Special Appeals:	
Filing Record on Appeal	50.00
Printing Brief for Appellant	187.20
Reply Brief	312.00
Portion of Record Extract-Appellant	2241.60
Total	2790.80*
Printing Brief for Appellee	153.60
Portion of Record Extract-Appellee	19.20
Printing Brief for Appellee Mullen & Evergreen	134.40
Total	307.20

IN THE COURT OF APPEALS OF MARYLAND

Petition Docket No. 240

September Term, 1988

(No. 1515, September Term,
1987 Court of Special Appeals)

ROBERT W. LUDWIG, JR.

v.

EVERGREEN OVERLOOK, INC., *et al.*

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answers filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: October 11, 1988

Supreme Court, U.S.
FILED
FEB 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-1140

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

ROBERT W. LUDWIG, JR.,

Petitioner,

v.

EVERGREEN OVERLOOK, INC., et al.

Respondents

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

Walter W. Pitsenberger
Counsel for Respondents
Evergreen Overlook, Inc. &
Judith H. Mullen
12806 Hollins Place
Bowie, Maryland 20716
301-262-5900

24pp

QUESTION PRESENTED FOR REVIEW

Was due process or equal protection denied to Robert W. Ludwig, Jr. who was given a jury trial on the merits; who appealed the verdict to the Court of Special Appeals; who failed to comply with the mandatory rules of procedure on appeal; and whose Petition for Certiorari to the Maryland Court of Appeals was denied?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ROBERT W. LUDWIG, JR.,

Petitioner,

v.

EVERGREEN OVERLOOK, INC., et al.

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

STATEMENT OF THE CASE

Petitioner, Robert W. Ludwig, Jr., is an attorney, who was admitted to the practice of law in Washington, D.C., at the time that he commenced his lawsuit in the Circuit Court for Prince George's County.

Ludwig had signed a form con-

tract to purchase a house which was to be built. That form document was not accepted by the developer and was never counter signed by anyone acting on behalf of the developer.

On the date set for settlement on the property, Ludwig filed this lawsuit. Ludwig had a dispute over the cost of the house, as built, with extras which had been added to the basic house at his request. That dispute prompted him to reject settlement, with an escrow, in order to cloud title to the real property with the litigation. That cloud, on the real property, prevented the sale or transfer of the property to any buyer who would require title insurance.

After he filed the suit, through counsel, he tried several short cuts to his goal - the house on his terms. The case was eventually assigned to a specific Judge for pre-trial and trial.

At the trial of the case, Ludwig was allowed to re-open his case twice, in order to present additional evidence or testimony. Ludwig had apparently decided, after each closing, that he had failed to include evidence or testimony which he felt was relevant or material. Objection was made to re-opening the case. But, he was allowed to re-open it twice before he finally tired of his disjointed case presentation.

The jury verdict was not

acceptable to him. He had won the right to buy the property, at a price he did not want to pay. When he equivocated on a settlement date, the court entered an order requiring the settlement by a date certain for the price set by the jury. The court order did not grant specific performance, only transfer of the title for payment.

Prior to the date, set by the order, Ludwig appealed to the Court of Special Appeals. Despite his own law degree, and the assistance of outside counsel, he did not include relevant parts of the case below, in his record on appeal. He did include several

hundred pages, carefully selected in an effort to buttress his opinion of the appealable issues in the matter. The foundation of the appeal, the pleadings and responses to the pleadings, were not included. Those pleadings framed the issues which the trial court had to consider as the plaintiff's disjointed presentation progressed. It was those pleadings which would have been necessary to determine whether the trial Judge properly or improperly ruled on matters; whether the trial Judge properly or improperly instructed the jury; whether the trial Judge permitted all of the triable issues to be aired.

As a result of this omission, the appeal was dismissed. Embarrassed by the oversight, and in an effort to continue the cloud on the property, Robert W. Ludwig, Jr. petitioned for certiorari to the Court of Appeals of Maryland. In that petition, his only issue was whether or not the Court of Special Appeals had abused its discretion when it dismissed his appeal. Certiorari was denied.

The Clerk of the lower Court had set the supersedeas bond in an amount greater than Two Hundred Thousand Dollars ($200,000.00), which represented the price set by the jury on the property, plus interest which would accrue, and costs. Ludwig, on motion, had the

bond reduced to Fifty Thousand Dollars ($50,000.00). Then, he did not post the bond until the holder of the title to the property sought to execute on the judgment. In 1988, months after he took the appeal, and months after the bond had been reduced on his motion, he finally filed the bond.

After Certiorari was denied, the petitioner, Ludwig, renewed a motion which had been filed while the petition for certiorari was pending. In that motion, he sought to have the lower Court revise the prior judgment which he had appealed. The lower Court denied that motion and entered a formal Order on December 30,

1988, settling the monetary amount due from Ludwig to the holder of the title.

Ludwig was not yet ready to concede that he had misconceived his remedy at the outset; that he had mistried his case in the lower Court; that he had failed to comply with the rules on appeal; and that he had been accorded all of the due process and/or equal protection to which he was entitled.

On January 9, 1989, Ludwig filed this Petition for Certiorari with the Supreme Court. On the same date, in the Circuit Court for Prince George's County, where this litigation began, through yet another attorney, he filed a Motion to Alter or to

Amend the December 30, 1988 Judgment. That Motion is still pending in the Circuit Court for Prince George's County. It is yet another attempt by Mr. Ludwig, to avoid the consequences of his actions.

REASONS FOR DENYING THE WRIT

Ludwig depicts himself as a naive, young lawyer, who has been victimized so thoroughly by the system that he has effectively been denied due process or equal protection.

Petitioner has cited some cases to which no argument can be taken. These Respondents will concede that an appeal should be dismissed for bad faith or flagrant disregard of court orders. Respondents will concede that egregious cases should

be dismissed.

Even if Ludwig doesn't see his actions and conduct as egregious, or in bad faith, his bare allegations that he has been denied due process and/or equal protection require more support than that contained in his petition.

Ludwig has cited the pertinent provisions of Maryland appellate Rule 1028, on page five (5) of his Petition. He has even emphasized that the rule requires inclusion of material that is reasonably necessary for the determination of the questions on appeal.

Petitioner believes that supplying more than four

hundred (400) pages of material as part of the record extract complies with this rule. That is not a tenable position.

Ludwig began the lawsuit with a complaint making bald allegations. He subsequently amended that lawsuit to include additional allegations, including fraud. Still later he amended the entire complaint to add four (4) additional parties. Answers, and other pleadings, were filed on behalf of the various defendants as the allegations were raised, or as the pleadings were amended.

Ludwig did not see fit to include those pleadings which formed the foundation of his

alleged causes of action against the various defendants. Nor did he see fit to include the defendants' responses or replies to his allegations. His omission impaired the ability of the Appeals Court to weigh those issues which Ludwig claimed had been improperly tried, or had been improperly resolved against him by Court rulings.

Ludwig has not explained his failure to include those relevant portions from the lower Court. He has tried to excuse himself by inferring that the omitted portions were not necessary to decide the appeal. It is apparent from his intellectual myopia that he expected the Judges to rummage through the four hundred (400)

plus pages of the appendix to divine the issues which the lower Court had before it at the time of the trial. The appellate Judges were not obligated to do that. Petitioner Ludwig was. He didn't!

The irrelevant issues which he has injected into his Petition (by citing cases dealing with the recusal of a Judge or the construction of Rule 23) do not give any support to his position and provide no guidance to a disposition of this matter.

The case of Wyndham v. Haines, 305 Md. 269, 503 A.2d 719 (1986) affirms that the provisions of Maryland rule 1028 (formerly Rule 828) are discretionary. A discretionary sanction leaves it to the

intelligence and experience of the Judge, or the panel, to exercise, or to decline to exercise, that discretion in a particular manner. Mr. Ludwig is not satisfied with the application of that discretion in this case, so he characterizes it as an abuse of discretion resulting in a denial of equal protection and/or due process. He has not demonstrated any abuse.

In the Wyndham case, supra, the discretionary decision favored the appellant, at the expense of the appellee. The appellee would have as much right, in that case, to claim that he was denied due process and equal protection, as Ludwig does in this case.

In the case of Eldwick Homes

Association, Inc. vs. Harvey L. Pitt, et al. 36 Md. App. 211, 373 A.2d 957 (1977), the Court of Special Appeals specifically addressed rule 1028 (b) (1). In the opinion, the Maryland Court of Special Appeals reviewed several prior cases on the same point, including Prime Contractors, Inc. v. Mayor of Baltimore, 241 Md. 55, 215 A.2d 214 (1965); Platt v. Wilson, 191 Md. 371, 62 A.2d 191 (1948).

In the Eldwick Homes Association, Inc. case, the Court of Special Appeals, closed its opinion by stating:

> Inasmuch as Md. Rule 828 as interpreted by the Court of Appeals requires dismissal and under the circumstances that Md. rule 1028 is substantially the same and

> differs only in that it is made applicable to this court, we believe we are compelled to follow the lead of the court of appeals in Prime and Platt and dismiss the appeal.

The Appeals courts, in Maryland, have been telling parties on appeal, for more than thirty (30) years, that the Appellate Rules are written for a purpose. Those rules must be complied with. There are sanctions for the failure to comply with the rules. There have been several decisions which have applied those sanctions, in order to warn non-complying parties that dismissal could, and would, be imposed.

Ludwig was an attorney. He had co-counsel in the case. They were both admitted to practice

law at the time that the appeal was taken. Presumptively, they read and understood the rules on Appeal.

The sanction imposed by the court, for the failure to comply with the rules, after prior decisions relating to similar deficiencies, hardly constitutes a denial of due process, or denial of equal protection.

CONCLUSION

This Petition for Certiorari should be denied. Mr. Ludwig is a brash, self-centered person whose attempts to achieve his own ends have failed to this point. In a final effort to evoke sympathy for his self generated plight, he has made bald allegations that he

has been denied due process and/or equal protection. His bald allegations are that and nothing more.

Respectfully Submitted,

Walter W. Pitsenberger
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301-262-5900

Dated: February 8, 1989

CERTIFICATE OF SERVICE

I, Walter W. Pitsenberger, being over the age of 18 years, hereby certify that I have this 10th day of February, 1989, mailed three (3) copies of the foregoing Opposition to Petition for a Writ of Certiorari to the Court of Special Appeals of Maryland upon petition of Robert W. Ludwig, Jr., and by mailing such copies to the attorneys of record or parties, in sealed envelopes, first class postage prepaid, and addressed as follows:

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Supreme Court, U.S.
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CLERK

No. 88-1140

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT W. LUDWIG, JR.,

Petitioner,

v.

EVERGREEN OVERLOOK, INC., *et al.*,

Respondents.

BRIEF OF PETITIONER IN REPLY TO BRIEFS OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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Petitioner Robert W. Ludwig, Jr. hereby replies to the briefs of respondents in opposition to the petition for a writ of certiorari.

Argument

While it is not the function of the Court to resolve factual issues, neither should the Court be influenced by inaccurate factual statements regarding the trial and appeal in this case.

For example, contrary to respondents' statements, petitioner did not receive a full "jury trial on the merits". Br. of Resps. Evergreen Overlook and Mullen, p. i; Br. of Resp. Luppino, p. 13. The trial court entered directed verdicts for the defendants-respondents at the close of the evidence as to three causes of action, and it was these rulings denying jury trial, *inter alia*, petitioner sought to appeal. To the extent that petitioner's claims were permitted to go to the jury, petitioner prevailed.

It is also misleading to state that the issue which petitioner raised below and thus brings to the Court is "only...whether or not the Court of Special Appeals had abused its discretion...." Br. of Resps. Evergreen Overlook and Mullen, p. 6. *See, e.g.*, Pet. App., pp. 20a-22a.

These misleading statements, together with *ad hominem* attacks on petitioner which are not true, are simply designed to suggest to the Court that the petitioner obtained a full hearing and jury consideration of all his claims, and that the "discretion" exercised by the Maryland Court of Special Appeals in dismissing the appeal was in fact an unspoken, disguised but "just" disposition on the merits. Respondent Luppino even suggests that the Maryland appeals court dismissed petitioner's appeal in the exercise of its discretion simply because the "Court of Special Appeals wanted to avoid further time and expense on this matter...." Br. of Resp. Luppino, p. 11.

In a similar vein, respondent Luppino argues that the "Golden Rule" of appellate review – that in the absence of abuse, an exercise of discretion by a trial court should not be disturbed upon appeal – was properly applied by the Maryland appeals court, and that the exercise of discretion in the application of its appellate procedural rules is in effect unreviewable and "not properly before" this Court. *Id.* pp. 10-13.

The cases relied upon for this "Golden Rule" were appeals that were decided "on the merits". *See* Br. of Resp. Luppino, pp. 11-12 (citing cases). In the case at bar, the petitioner was denied review of the "merits" of his appeal.

These misleading contentions and factual misstatements are far afield and, in fact, totally irrelevant to the single, unadorned constitutional issue which petitioner brings to the Court, an issue respondents failed to address: was the extreme sanction of summary dismissal of an appeal because of the omission of pleadings in the record extract or appendix, under the circumstances of the case, an impermissible denial of petitioner's state-created right of appeal in violation of federal due process and equal protection. In other words, may a state-created right of appellate review "on the merits" of a trial court's decision be constitutionally denied in the

absence of a jurisdictional defect, or flagrant disregard of court rules or orders giving rise to a presumption of a want of merit in the appeal.

The procedural infraction which the Maryland Court of Special Appeals found, was a failure to include pleadings in the record extract or appendix pursuant to Maryland Rule 1028. Maryland Rule 1028, the rule petitioner attempted to follow to prosecute his appeal, does not specifically require the pleadings to be included, nor do the respondents dispute that the rule leaves to the litigants a modicum of judgment about the portions of the record needed for a resolution on the merits.

Respondents have essentially conceded the following relevant facts, on which petitioner's constitutional issue in part rests:

1. That the material mandated for every appeal was included in the record extract, Br. of Resp. Luppino, p. 5 n.5;
2. That "no reported Maryland decision has ever explicitly required that pleadings be included in the extract for an appeal", Br. of Resp. Luppino, p. 6; and
3. That four of seven issues on appeal had no arguable relation to the omitted pleadings, and could have been reviewed on the merits.

Respondents also seem to agree that, in Maryland, dismissal of an appeal is warranted only in egregious cases, such as bad faith or flagrant disregard of court orders, Br. of Resps. Evergreen Overlook and Mullen, pp. 9-10; Br. of Resp. Luppino, p. 9, and that the Maryland Special Appeals Court made no finding of "egregious conduct." The omission of the pleadings from the record extract in this case was neither egregious nor defiant of any court rule or order or right of respondents where, at the cost of almost $3,000 (Pet. App., p. 7a), petitioner in good faith meticulously assembled a full and fair record extract, including portions requested by respondents, and exercising judgment as to what portion of the record the court needed to decide the issues

on appeal. The Maryland appeals court should have considered petitioner's appeal on the merits.

The Court has, from the beginning, recognized that due process requires that a citizen have a fair opportunity to be heard on the merits, whether at the trial level or on appeal where the State had granted a right of appeal. The Court has stated that "a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). This means that a litigant, consistent with due process and equal protection, "cannot be arbitrarily denied the right to a meaningful opportunity to be heard on appeal." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 18 (1987)(Brennan, J., concurring). Unless the litigant forfeits his right of appeal as a jurisdictional matter by failure to lodge a timely appeal, or by an egregious and intentional flaunting of the rules or orders of court, the litigant, having been granted a right of appeal, is entitled to a disposition of his appeal on the merits, and appellate rules should be construed to achieve that result. *Torres v. Oakland Scavenger Co.*, 487 U.S. __, 108 S. Ct. 2405, 2408 (1988); *Houston v. Lack*, 487 U.S. __, 108 S. Ct. 2379 (1988). This "important principle...[signifies] that the requirements of the rules of procedure should be liberally construed and that 'mere technicalities' should not stand in the way of consideration of a case on its merits." *Torres*, 108 S. Ct. at 2408. *See also Mutual Life Insurance Co. v. Phinney*, 178 U.S. 326, 337(1900)("While we have always been careful to see that the required order of procedure has been complied with..., at the same time we have been equally careful to hold that no mere technical omission which did not prejudice the rights of the defendant in error should be made available to oust the appellate court of jurisdiction.")

The right of a citizen to have his dispute considered on the merits was regarded as so important by the Court that it evolved the *Hammond Packing Co.* rule to reconcile a state court's dismissal of legal actions for procedural (discovery) violations with the right of a litigant to a disposition on the merits. *See Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909), recently reaffirmed in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea*, 456 U.S. 694, 705-706 (1982). In effect, *Hammond Pack-*

ing Co. held that the extreme sanction of dismissal for a procedural default can be sustained if the dereliction is so serious as to give rise to a presumption of a want of merit to the litigant's position. As the Court stated in *Insurance Corp. of Ireland., supra*, "due process is violated only if the behavior of the defendant will not support the Hammond Packing presumption." 456 U.S. at 706.

The due process considerations which are the underpinning of the so-called *Hammond Packing* presumption have equal applicability to a case on appeal such as the case at bar. Applying the principle of *Hammond Packing*, it is difficult to conceive that the omission of a pleading from a record extract or appendix could ever give rise to the "presumption of want of merit", except perhaps in cases presenting egregious, flagrant conduct, which is clearly not this case.

The dismissal of petitioner's appeal under the circumstances of this case runs contrary to the principles of due process underlying the *Hammond Packing* presumption, and violates the teachings of the Court in *Insurance Corp. of Ireland* and the other recent precedents quoted above.

The basic constitutional issue, whether stated in terms of the *Hammond Packing* presumption or otherwise, is whether petitioner was denied due process and equal protection because his right of appeal and his right to consideration of his appeal on the merits was denied because of a perceived, non-egregious procedural infraction, which had never been discussed, let alone condemned, in reported Maryland case law.

Petitioner's constitutionally-guaranteed right of trial by jury and his state-created right to appeal a denial of jury trial mean little if they can be taken away by a trial court's ruling which an appeals court "in its discretion" can decline to review "on the merits" because of a perceived procedural, non-jurisdictional infraction.

Conclusion

For the reasons set forth above, and in the petition, petitioner urges that the petition for a writ of certiorari be granted and the Court summarily reverse the decision of the Maryland

Court of Special Appeals dismissing the appeal with instructions to hear the appeal upon petitioner's compliance with any order of the appellate court regarding the contents of the record extract.

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Dated: February 17, 1989
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CERTIFICATE OF SERVICE

I, Thomas J. Whalen, being over the age of 18 years and a member of the firm of Condon & Forsyth, hereby certify that I have this seventeenth day of February, 1989, served three copies of the foregoing brief of petitioner in reply to the briefs of respondents in opposition to petition for a writ of certiorari to the Court of Special Appeals of Maryland upon respondents Evergreen Overlook, Inc., et al., the only parties required to be served, by mailing such copies to their attorneys of record in sealed envelopes, first class postage prepaid, deposited at the United States Post Office, located at North Capitol and Massachusetts Avenue, N.E., Washington, D.C., and addressed as follows:

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